

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 15, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP2978

Cir. Ct. No. 1999CF149

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS C. OWENS,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for La Crosse County:
DENNIS G. MONTABON, Judge. *Affirmed.*

Before Lundsten, P.J., Dykman and Deininger, JJ.

¶1 PER CURIAM. Thomas Owens appeals two orders, the first denying his motion for postconviction relief under WIS. STAT. § 974.06 (2003-

04)¹ without a hearing, and the second denying his motion for reconsideration. We affirm for the reasons discussed below.

BACKGROUND

¶2 Nicole Zollman reported to police that she had discovered a man in the hall of her boyfriend's apartment. According to a written statement prepared by police, she said the man identified himself as a friend of her boyfriend, so she told him he could wait until the boyfriend got out of the shower. However, when the boyfriend got out of the shower, he said he did not know the man. The man left quickly, and the couple then discovered several items missing, including Zollman's ring.

¶3 Zollman said when she was called down for a police lineup the following month, she told the officer that the man had identified himself to her as "Thomas." However, the officer wrote in his report that Zollman said the man had identified himself as "Tom Owens." At both a suppression hearing and at trial, the officer clarified that Zollman had said only that the man identified himself as Thomas; the officer told Zollman that Thomas's last name was Owens after the lineup; and his written report was in error.

¶4 A jury found Owens guilty of burglary and theft. The court sentenced Owens to a jail term on the theft count and imposed and stayed a seven-year sentence on the burglary count. Owens did not pursue a direct appeal,

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

although he did submit a series of requests for sentence modification, one of which resulted in an amendment to the judgment of conviction.

¶5 Owens' probation on the burglary count was subsequently revoked. After the circuit court denied his petition for certiorari review of the revocation proceeding, Owens filed a motion for postconviction relief from the original conviction under WIS. STAT. § 974.06, alleging that the complaint and information were deficient; the victim's identification of him was unduly suggestive; and trial counsel was ineffective in several respects.

¶6 The trial court denied the motion, explaining that Owens' understanding of the elements of the burglary charge was flawed and that the allegations in the complaint were sufficient. Owens then filed a motion for reconsideration, complaining that the trial court had not addressed his claims regarding the identification procedure and counsel's performance. The trial court responded that "neither 'issue' appeared to rise to a level worth discussing," and reiterated its position that nothing in the motion warranted a hearing. Owens challenges the identification procedure on appeal, claiming that the identification was unduly suggestive because police gave the victim Owens' name, the prosecution deliberately presented falsified testimony and delayed filing charges to hinder his ability to challenge the identification, and counsel was ineffective for failing to raise these issues.

DISCUSSION

¶7 The State claims that Owens' current claims are procedurally barred under *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Under *Escalona*, constitutional claims that could have been raised in a prior postconviction motion or a prior direct appeal cannot be the basis for a WIS. STAT.

§ 974.06 motion unless the court finds there was sufficient reason for failing to raise the claim earlier. *Id.* at 185. The State argues that Owens could have challenged the identification procedure when he requested modification of his sentence on the theft charge or by directly appealing his convictions.

¶8 *Escalona* requires the consolidation of all claims of error into one postconviction motion or appeal, absent a showing of a sufficient reason for not doing so. *State v. Lo*, 2003 WI 107, ¶44, 264 Wis. 2d 1, 665 N.W.2d 756. *Escalona*, however, does not bar a WIS. STAT. § 974.06 motion when a defendant has neither filed a postconviction motion under § 974.02 nor directly appealed the conviction. *See id.*, ¶44 n.11. The § 974.06 procedure provides a mechanism for review of a limited class of constitutional claims after the time for direct appeal has expired. WIS. STAT. § 974.06(1).

¶9 Owens did not directly appeal his convictions and has not previously filed a postconviction motion under either WIS. STAT. § 974.02 or § 974.06 prior to the present motion. His sentence modification requests were made to jail staff and then forwarded to the circuit court under a separate procedure which would not have allowed substantive challenges to a conviction other than the one for which he was serving the sentence. *See* WIS. STAT. § 973.19. We are therefore not persuaded that *Escalona* applies on the present facts. *See Lo*, 264 Wis. 2d 1, ¶44 n.11.

¶10 Thus, the issue before us is whether the trial court properly denied Owens' motion without a hearing. In order to obtain a hearing on a postconviction motion, a defendant must allege sufficient material facts to entitle him to the relief sought. *State v. Allen*, 2004 WI 106, ¶36, 274 Wis. 2d 568, 682 N.W.2d 433. No hearing is required when a defendant presents only conclusory allegations or if the

record conclusively demonstrates that the defendant is not entitled to relief. *Nelson v. State*, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972).

¶11 All of Owens' complaints on appeal deal with the identification procedure, and they rest on his allegations that the victim was unable to identify Owens at an initial lineup and that a police officer told the victim Owens' name prior to a second photo lineup. These allegations, however, cannot be based on Owens' personal knowledge because he was not present with Zollman and the officer at the photo lineup, and he discloses no other witnesses or evidence he could produce to establish the truth of his allegations. Owens asserts no other basis for concluding the photo lineup was unduly suggestive, or for his claims that the State elicited false testimony regarding the identification procedure and that his counsel performed ineffectively with regard to challenging the identification. In sum, Owens' motion contains only conclusory allegations and fails to allege facts showing a need for an evidentiary hearing. Accordingly, we conclude the trial court did not err in denying Owens' motion without an evidentiary hearing

By the Court.—Orders affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

